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and OTTOMOTTO LLC

18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA  
20 SAN FRANCISCO DIVISION

21 WAYMO LLC,

Case No. 3:17-cv-00939-WHA

22 Plaintiff,

**DEFENDANTS UBER  
TECHNOLOGIES, INC. AND  
OTTOMOTTO LLC'S  
ADMINISTRATIVE MOTION TO  
FILE UNDER SEAL PORTIONS OF  
THEIR MOTION TO EXCLUDE  
TESTIMONY AND OPINIONS OF  
WAYMO'S DAMAGES EXPERT  
MICHAEL WAGNER**

23 v.

24 UBER TECHNOLOGIES, INC.,  
OTTOMOTTO LLC; OTTO TRUCKING LLC,

25 Defendants.

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Pursuant to Civil Local Rules 7-11 and 79-5, Defendants Uber Technologies, Inc. and Ottomotto LLC (“Defendants”) submit this motion for an order to file under seal portions of their Motion to Exclude Testimony and Opinions of Waymo’s Damages Expert Michael Wagner. Specifically, Defendants request an order granting leave to file under seal the confidential portions of the following documents:

<b>Document</b>	<b>Portions to Be Filed Under Seal</b>	<b>Designating Party</b>
Motion to Exclude Testimony and Opinions of Waymo’s Damages Expert Michael Wagner (“Motion”)	Highlighted Portions	Defendants (Blue) Plaintiff (Green)
Exhibit 1 to the Declaration of Matthew R. Berry	Entirety	Plaintiff
Exhibit 2 to the Declaration of Matthew R. Berry	Entirety	Defendants
Exhibit 3 to the Declaration of Matthew R. Berry	Entirety	Plaintiff
Exhibit 4 to the Declaration of Matthew R. Berry	Highlighted Portions	Defendants (Blue)
Exhibit 5 to the Declaration of Matthew R. Berry	Entirety	Defendants
Exhibit 6 to the Declaration of Matthew R. Berry	Highlighted Portion	Defendants (Blue)
Exhibit 7 to the Declaration of Matthew R. Berry	Highlighted Portions	Defendants (Blue)
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Exhibit 9 to the Declaration of Matthew R. Berry	Entirety	Plaintiff
Exhibit 10 to the Declaration of Matthew R. Berry	Highlighted Portions	Plaintiff (Green)
Exhibit 11 to the Declaration of Matthew R. Berry	Entirety	Defendants

Document	Portions to Be Filed Under Seal	Designating Party
Exhibit 12 to the Declaration of Matthew R. Berry	Highlighted Portions	Defendants (Blue)
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Exhibit 19 to the Declaration of Matthew R. Berry	Entirety	Plaintiff
Exhibit 21 to the Declaration of Matthew R. Berry	Entirety	Plaintiff
Exhibit 22 to the Declaration of Matthew R. Berry	Entirety	Defendants
Exhibit 23 to the Declaration of Matthew R. Berry	Entirety	Defendants
Exhibit 24 to the Declaration of Matthew R. Berry	Entirety	Defendants

The blue-highlighted portions of the Motion, the entirety of Exhibits 2, 5, 8, 11, 14, 22, 23, and 24 to the Berry Declaration, and the blue-highlighted portions of Exhibits 4, 6, 7, 12, 13, and 15 to the Berry Declaration contain highly confidential information regarding Uber's business forecasts and projections, organization run rates, market comparables, development strategies and performance on milestones, and responses to interrogatories regarding time and cost estimates for redesign of accused features. This highly confidential information is not publicly known, and its confidentiality is strictly maintained. Disclosure of this information could allow competitors to obtain a competitive advantage over Uber by giving them details into Uber's business and development strategies, such that they could tailor their own strategies and Uber's competitive standing could be significantly harmed. (Decl. of Halley Josephs in Support of Defendants' Administrative Motion to File Documents Under Seal ("Josephs Decl.") ¶ 3.)

1       The green-highlighted portions of the Motion, the entirety of Exhibits 1, 3, 9, 19, and 21  
2 to the Berry Declaration, and the green-highlighted portions of Exhibit 10 to the Berry  
3 Declaration contain information that has been designated “Highly Confidential – Attorneys’ Eyes  
4 Only” or “Confidential” by Waymo in accordance with the Patent Local Rule 2-2 Interim Model  
5 Protective Order (“Protective Order”), which the parties have agreed governs this case (Transcript  
6 of 3/16/2017 Hearing, page 6). Defendants file this material under seal in accordance with  
7 Paragraph 14.4 of the Protective Order. (Josephs Decl. ¶ 4.)

8           Pursuant to Civil Local Rule 79-5(d)(2), Defendants will lodge with the Clerk the  
9 documents at issue, with accompanying chamber copies.

10          Defendants served Waymo with this Administrative Motion to File Documents Under  
11 Seal on September 16, 2017.

12          For the foregoing reasons, Defendants request that the Court enter the accompanying  
13 Proposed Order granting Defendants’ Administrative Motion to File Documents Under Seal and  
14 designate the service copies of these documents as “HIGHLY CONFIDENTIAL –  
15 ATTORNEYS’ EYES ONLY.”

16  
17 Dated: September 16, 2017

SUSMAN GODFREY LLP

18  
19 By: /s/ William Christopher Carmody  
20 William Christopher Carmody

21           Attorneys for Defendants  
22 UBER TECHNOLOGIES, INC.  
23 and OTTOMOTTO LLC

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## **ATTESTATION OF E-FILED SIGNATURE**

I, Arturo J. González, am the ECF User whose ID and password are being used to file this Motion. In compliance with General Order 45, X.B., I hereby attest that William Christopher Carmody has concurred in this filing.

Dated: September 16, 2017

*/s/ Arturo J. González*

ARTURO J. GONZÁLEZ

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18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA  
20 SAN FRANCISCO DIVISION

21 WAYMO LLC,  
22 Plaintiff,  
23 v.  
24 UBER TECHNOLOGIES, INC.,  
OTTOMOTTO LLC; OTTO TRUCKING LLC,  
25 Defendants.

26 Case No. 3:17-cv-00939-WHA

27  
28 **DECLARATION OF  
HALLEY JOSEPHS IN SUPPORT OF  
DEFENDANTS' ADMINISTRATIVE  
MOTION TO FILE UNDER SEAL  
PORTIONS OF THEIR MOTION TO  
EXCLUDE TESTIMONY AND  
OPINIONS OF WAYMO'S DAMAGES  
EXPERT MICHAEL WAGNER**

1 I, Halley Josephs, declare as follows:

2       1. I am an attorney at the law firm of Susman Godfrey LLP. I make this declaration  
 3 based upon matters within my own personal knowledge and if called as a witness, I could and  
 4 would competently testify to the matters set forth herein. I make this declaration in support of  
 5 Defendants' Administrative Motion to File Under Seal Portions of Their Motion to Exclude  
 6 Testimony and Opinions of Waymo's Damages Expert Michael Wagner.

7       2. I have reviewed the following documents and confirmed that only the portions  
 8 identified below merit sealing:

<b>Document</b>	<b>Portions to Be Filed Under Seal</b>	<b>Designating Party</b>
Motion to Exclude Testimony and Opinions of Waymo's Damages Expert Michael Wagner ("Motion")	Highlighted Portions	Defendants (Blue) Plaintiff (Green)
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Exhibit 23 to the Declaration of Matthew R. Berry	Entirety	Defendants
Exhibit 24 to the Declaration of Matthew R. Berry	Entirety	Defendants

3. The blue-highlighted portions of the Motion, the entirety of Exhibits 2, 5, 8, 11, 14, 22, 23, and 24 to the Berry Declaration, and the blue-highlighted portions of Exhibits 4, 6, 7, 12, 13, and 15 to the Berry Declaration contain highly confidential information regarding Uber's business forecasts and projections, organization run rates, market comparables, development strategies and performance on milestones, and responses to interrogatories regarding time and cost estimates for redesign of accused features. This highly confidential information is not publicly known, and its confidentiality is strictly maintained. Disclosure of this information could allow competitors to obtain a competitive advantage over Uber by giving them details into

- 1 Uber's business and development strategies, such that they could tailor their own strategies and
- 2 Uber's competitive standing could be significantly harmed.

3           4. The green-highlighted portions of the Motion, the entirety of Exhibits 1, 3, 9, 19,  
4 and 21 to the Berry Declaration, and the green-highlighted portions of Exhibit 10 to the Berry  
5 Declaration contain information that has been designated “Highly Confidential – Attorneys’ Eyes  
6 Only” or “Confidential” by Waymo in accordance with the Patent Local Rule 2-2 Interim Model  
7 Protective Order (“Protective Order”), which the parties have agreed governs this case (Transcript  
8 of 3/16/2017 Hearing, page 6). Defendants file this material under seal in accordance with  
9 Paragraph 14.4 of the Protective Order.

10       5. Defendants' request to seal is narrowly tailored to the portions of the Motion and  
11 its supporting papers that merit sealing.

12 I declare under penalty of perjury that the foregoing is true and correct. Executed this 16<sup>th</sup>  
13 day of September, 2017 at New York, New York.

14

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/s/ *Halley Josephs*

Halley Josephs

## ATTESTATION OF E-FILED SIGNATURE

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JOSEPHS DECLARATION ISO DEFENDANTS' ADMINISTRATIVE MOTION TO FILE UNDER SEAL  
Case No. 3:17-cv-00939-WHA  
sf-3822194

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.,  
OTTOMOTTO LLC; OTTO TRUCKING LLC,

Defendants.

Case No. 3:17-cv-00939-WHA

**[PROPOSED] ORDER GRANTING  
DEFENDANTS UBER  
TECHNOLOGIES, INC. AND  
OTTOMOTTO LLC'S  
ADMINISTRATIVE MOTION TO  
FILE DOCUMENTS UNDER SEAL**

Upon consideration of Defendants Uber Technologies, Inc. and Ottomotto LLC's ("Defendants") Administrative Motion to File Documents Under Seal, and finding that good cause exists, this Court hereby GRANTS Defendants' Administrative Motion to File Documents Under Seal and ORDERS that the following documents shall be sealed, as indicated below:

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Exhibit 22 to the Declaration of Matthew R. Berry	Entirety
Exhibit 23 to the Declaration of Matthew R. Berry	Entirety
Exhibit 24 to the Declaration of Matthew R. Berry	Entirety

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_, 2017

---

HONORABLE WILLIAM ALSUP  
United States District Judge

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18 NORTHERN DISTRICT OF CALIFORNIA  
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21 WAYMO LLC,

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DAMAGES EXPERT MICHAEL  
WAGNER**

23 v.

24 UBER TECHNOLOGIES, INC.,  
OTTOMOTTO LLC; OTTO TRUCKING LLC,

25 Defendant.

27 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**

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1     **Statutes**

2     18 U.S. Code § 1836(b)(i)(II) .....7

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## INTRODUCTION

Waymo's future damages models are speculative and unreliable, and this case should proceed to trial without any monetary damages expert. Waymo cannot say it was not warned. At the August 16th hearing, this Court cautioned:<sup>1</sup>

[I]f Waymo has become greedy and we knock out your damages, there won't be a retrial. You just won't have a damages report. We just go to trial without it. There's no God-given right to have a damages report.

Yet Waymo has now put forward damages opinions from Michael Wagner that swing for the fences. The result: claims for future “unjust profits” for each of the nine asserted trade secrets that reach as high as [REDACTED] for a single trade secret. Wagner then arbitrarily increases that figure by [REDACTED] under *Georgia Pacific*, resulting in total damages of [REDACTED] for the alleged misappropriation of a single trade secret. To put that number into context, Uber could have purchased Velodyne for half of the amount that Waymo is seeking for a single trade secret. The only thing more remarkable than the magnitude of this number is how Wagner arrived at it.

The below chart summarizes Wagner's unjust enrichment calculations for each trade secret before applying an across-the-board reasonable royalty enhancement:<sup>2</sup>

This block contains a large, solid black rectangle that occupies most of the page. It appears to be a placeholder for an image or a section of text that has been removed or is not yet present.

As reflected in the two columns, Wagner opines that Uber will benefit from the asserted trade secrets in two ways: future profits from accelerated commercialization and future saved development costs.

<sup>1</sup> 8/16/17 Confidential Hr'g Tr., at 135:6-9; *see also* 6/7/17 Hr'g Tr., at 55:25-56:4 (“I have given up on trying to give you second bites at the apple. So if your expert goes out the door because the methodology sucks, too bad for you. You just don’t have the expert at trial.”).

<sup>2</sup> See Berry Decl. Ex. 1, Wagner Rpt. Figure 13.

1           Wagner calculates those astronomical figures using a methodology that is not reliable,  
 2 inserting variables that he neither derived nor tested, and making assumptions that no reasonable  
 3 expert would make. For accelerated development, he takes an 18-month old slide prepared by an  
 4 Uber corporate development manager that was never used for any purpose, adopts it without  
 5 testing it, and then opines that the nine discrete trade secrets relating to LiDAR hardware will  
 6 allow Uber's entire autonomous vehicle ("AV") program to skip ahead [REDACTED] in all aspects of  
 7 development and commercialization. For saved development costs, Wagner assumes the discrete  
 8 trade secrets will allow Uber to save, for a [REDACTED] period, the run rate for Uber's entire 1500-  
 9 person AV unit. These two theories do not come close to meeting causation and apportionment  
 10 standards, and the assumptions on which they depend are wholly unreliable and untested.

11           Illustrating just how deficient Wagner's opinions are, he has now submitted a *48-page*  
 12 reply, with over 1200 pages of exhibits, attempting to retroactively substantiate his flawed  
 13 assumptions. Wagner's reply not only fails to do so, but disregards this Court's case management  
 14 order, which requires "very brief" replies that "should not add new material that should have been  
 15 placed in the opening report." (Dkt. 563 at ¶ 5.)

16           Whether Wagner's reply report is considered or not, the fact remains that Wagner's  
 17 damages opinions and testimony are irredeemably flawed and should be excluded in their  
 18 entirety, without any opportunity to amend or submit a new report.<sup>3</sup> The flaws in Wagner's  
 19 report are glaringly obvious and go to the core of his opinions. Even setting aside the expedited  
 20 schedule and the Court's prior warnings, it would be patently unfair to allow Waymo to try to see  
 21 what it could get away with—only to get a do-over on the eve of trial.

## 22           **LEGAL STANDARD**

23           As this Court has recognized, an expert witness may provide opinion testimony "if (1) the  
 24 testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable

---

25           <sup>3</sup> Perhaps not surprisingly, courts have excluded Wagner's opinions as too speculative and not  
 26 reliable several times. See, e.g., *Eagle Harbor Holdings, LLC v. Ford Motor Co.*, No. C11-5503  
 27 BHS, 2015 WL 12670404, at \*2 (W.D. Wash. Mar. 9, 2015) (excluding opinion for being based  
 28 on "pure speculation"); *Intellectual Ventures I LLC v. Xilinx, Inc.*, No. 10-1065-LPS, 2014 WL  
 1814384, at \*4 (D. Del. Apr. 14, 2014) (excluding Wagner's opinion for failing to consider  
 "highly relevant" evidence, rendering his entire opinion "unreliable and irrelevant.").

1 principles and methods, and (3) the witness has applied the principles and methods reliably to the  
 2 facts of the case.” *Oracle Am., Inc. v. Google Inc.*, 798 F. Supp. 2d 1111, 1114 (N.D. Cal. 2011).  
 3 District courts are thus charged with a gatekeeping role, and should exclude evidence that is  
 4 “based on mere ‘subjective belief or unsupported speculation’” or is “inherently unreliable and  
 5 unsupported by the facts.” *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th  
 6 Cir. 2014) (citation omitted). Further, courts should exclude testimony if “there is simply too  
 7 great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522  
 8 U.S. 136, 146 (1997).

## 9 ARGUMENTS AND AUTHORITIES

### 10 I. WAGNER’S ACCELERATED DEVELOPMENT THEORY IS UNRELIABLE

11 Wagner’s accelerated commercialization opinion is really a future profits model because it  
 12 attempts to calculate Uber’s incremental future profits from accelerating its AV program, and it  
 13 fails for three reasons. First, forecasting profits in the nascent autonomous vehicle industry that  
 14 has not yet been commercialized is inherently speculative. Second, the model relies on a highly  
 15 speculative and outdated projection of future profits that was never used or relied on by Uber and  
 16 that Wagner does not test. Finally, Wagner fails to establish a causal link between the purported  
 17 future profits and the specific trade secrets or to apportion among them in any reliable manner.

#### 18 A. Forecasting Future Profits In a Nascent Industry Is Highly Speculative

19 Any attempt to calculate future profits in a nascent industry, like using autonomous  
 20 vehicles to transport passengers, is based on many levels of speculation. *See, e.g., Brooktree*  
*21 Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1581 (Fed. Cir. 1992) (“The burden of  
 22 proving future injury is commensurately greater than that for damages already incurred, for the  
 23 future always harbors unknowns” and affirming exclusion of damages as too speculative given  
 24 the “uncertainties of future pricing, future competition, and future markets, in this fast-moving  
 25 field, as well as the requirements of proof of future losses.”); *Sargon Enters., Inc. v. Univ. of S.*  
*26 Cal.*, 149 Cal.Rptr.3d 614, 634 (Cal. Ct. App. 2013) (noting that predicting future profits for an  
 27 unestablished business is generally “uncertain, contingent, and speculative” and only proper  
 28 where the predicate future events “can be shown by evidence of reasonable reliability.”). Rather

than addressing these challenges and explaining how he accounted for them, Wagner's analysis simply glosses over them. To the extent it would be possible at all to project future profits in the nascent self-driving car industry, Wagner provides no reliable analytical framework to do so.

The degree of speculation involved in forecasting profits in an industry that does not yet exist (and may never exist) cannot be emphasized enough. And the layers of speculation are compounded by the fact that Wagner is attempting to forecast profits through 2022—five years into the future. No transportation as a service (“TaaS”) company has ever earned revenue (let alone profits) from transporting passengers in an autonomous vehicle with no safety driver; no fleet of autonomous vehicles currently exist that are ready for commercializing the TaaS business model; the future competitive landscape is highly unpredictable and unknowable; and federal, state, and local laws are a complex and often conflicting web of regulations that do not expressly permit, and in many states expressly prohibit, fully autonomous vehicles transporting passengers.<sup>4</sup>

#### **B. Wagner Relies On a Speculative Projection of Future Profits**

14           Wagner does not perform any independent analysis and instead purports to calculate  
15       Uber's future profits by relying on a single slide from January 2016 prepared by Nina Qi, a new  
16       corporate development manager at Uber (the "Qi Slide"). (Berry Decl. Ex. 5 at UBER00069033.)  
17       In this slide, Qi attempted to quantify the present value of "incremental EBIT" (i.e., future profits)  
18       that Uber could potentially realize if it were able to accelerate commercialization of Uber's AV  
19       program by [REDACTED]. (*Id.*)

20 This single slide is the entire basis of Wagner’s unjust profits damages model. Yet it is  
21 from a four-slide PowerPoint that Ms. Qi didn’t even consider a presentation and was never used  
22 or relied upon for any purpose. In Ms. Qi’s words, “[a]fter I completed the exercise it was never  
23 talked about again.” (Berry Decl. Ex. 6, 6/22/17 Qi Dep. at 217:3-17, 222:1-223:22).<sup>5</sup> Wagner’s  
24 wholesale reliance on the Qi Slide without conducting any independent tests of its underlying

<sup>26</sup> <sup>4</sup> Berry Decl. Ex. 2, Bratic Rebuttal Rpt. ¶¶ 45-69; Ex. 3, 8/2/17 Krafcik Dep. at 131:4-132:1; Ex. 4, 7/28/17 Michael Dep. at 138:25-139:3

<sup>5</sup> *Id.* at 217:2-218:12 (it was only shown to two people and “was not a presentation”) and 223:1-5 (“Again, this is my own assessment and ultimately was not used in any forum.”).

models and assumptions renders his opinions unreliable. *See, e.g., Fail-Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 886 (E.D. Wisc. 2010) (striking plaintiff’s expert report that relied on data provided by the defendant regarding market share, projected sales, and market adoption, without independently verifying the data or assumptions); *Bruno v. Bozzuto’s, Inc.*, 311 F.R.D. 124, 144 (M.D. Pa. 2015) (excluding plaintiff’s expert report that relied on defendant’s projections because “the expert must conduct some sort of independent investigation or verification to ensure that the data he or she plans to use is both accurate and helpful to the court in light of the disputed issues”); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 556 (C.D. Cal. 2014) (expert may only rely on opinion of others if “the record demonstrates that the expert conducted an independent evaluation of that evidence); *Legendary Art, LLC v. Godard*, No. 11-0674, 2012 WL 3550040, at \*5 (E.D. Pa. Aug. 17, 2012) (“Unverified profit and loss projections cannot be the type of evidence ‘reasonably relied upon by experts’ as required by *Daubert* and the Federal Rules of Evidence.” (emphasis in original)).

## **1. The Qi Slide Was Speculative and Unreliable When Created**

15 The Qi Slide is derived from Uber's [REDACTED]  
16 [REDACTED]  
17 [REDACTED].<sup>6</sup> Had Wagner conducted a proper test,  
18 he would have immediately seen the following warning in a red box on the [REDACTED]  
19 [REDACTED]  
20 [REDACTED]"  
21 (*Id.* Ex. 8 at UBER00232490.) For example, the Qi Slide assumes that Uber will have [REDACTED]  
22 [REDACTED]. But Wagner failed to test that assumption, and did not  
23 even identify the [REDACTED]  
24 [REDACTED].

<sup>6</sup> *Id.* Ex. 7, 8/18/17 Uber Corp. Rep. (Meyhofer) Dep. at 82:4-86:6

|| and you see different data....

1       Uber is not alone in characterizing future profits from AV as speculative.<sup>7</sup> Waymo has  
 2 identified numerous “[REDACTED]” that “[REDACTED]  
 3 [REDACTED].” (*Id.* Ex. 9 at WAYMO-UBER-00046625.) Uber faces these same  
 4 risks. Yet Wagner failed to assess whether and how the Qi Slide reliably accounts for any of  
 5 these risks, or how a discount rate of 15% could possibly be reasonable in light of these risks.  
 6 Both Waymo and industry analysts have used a [REDACTED] discount rate for their own projections. (*Id.*  
 7 Ex. 2 ¶ 36; Ex. 10 at 238:12-241:20 (discussing Waymo’s consistent use of a [REDACTED] discount rate  
 8 and stating that, for immature markets, “[REDACTED] and  
 9 “possible” that it was higher than 50%); *see also Fail-Safe L.L.C*, 744 F. Supp. 2d at 894 (noting  
 10 “extreme importance in using an accurate discount rate when calculating damages” and finding  
 11 expert’s suggested rate unreliable) (citation omitted).)

## 12           **2.       Wagner Failed To Consider Significant Intervening Events**

13       Even if it were proper to rely on the Qi Slide when it was created, which it was not,  
 14 intervening events made it unreasonable for Wagner to rely on it in his report eighteen months  
 15 later. When attempting to forecast future profits in any industry, it is imperative to use the most  
 16 recent and accurate data and assumptions. *See Brooktree Corp.*, 977 F.2d at 1581. That is  
 17 especially true in a nascent industry. Despite Uber producing recent financial data and forecasts,  
 18 Wagner chose instead to rely on the stale Qi Slide.

19       Wagner failed to assess how events that occurred in the eighteen months since the Qi  
 20 Slide was created impacted its underlying assumptions and results. For example, the Qi Slide  
 21 assumes that the Otto acquisition will advance Uber’s AV program by [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]

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24 \_\_\_\_\_  
 25 <sup>7</sup> Berry Decl. Ex. 10, 8/23/17 Su Dep. (former Waymo financial manager) at 75:6-75:11  
 26 (testifying that identifying a range of possible valuation outcomes for Waymo was “pretty  
 27 speculative”); *id.* at 118:4-12.

28 <sup>8</sup> For example, a May 2016 [REDACTED] presentation that Wagner relied on forecasts that  
 29 Uber AV will [REDACTED]. *See* Berry  
 Decl. Ex. 11 at UBER00232620. [REDACTED]. *Id.* Ex. 12,  
 6/16/17 Bares Dep. at 96:11-97:13; Ex. 13, 8/11/17 Bares Dep. at 363:2-10.

[REDACTED]

[REDACTED]<sup>9</sup> Meanwhile, competition has dramatically increased, with Uber’s primary competitor Lyft partnering with Waymo,<sup>10</sup> Ford announcing plans to introduce self-driving cars by 2021,<sup>11</sup> and GM acquiring Cruise Automation.<sup>12</sup> And the regulatory process has moved more slowly than expected, with Wagner failing to identify a single state that expressly permits the transport of passengers in a fully AV. The Qi Slide does not (and cannot) take into account the impact of these later events, yet Wagner made no attempt to assess how these recent events impact the assumptions and methodology underlying the Qi Slide or his ultimate opinions. As a result, Wagner’s opinions are not reliable and should be excluded. *See, e.g., Fail-Safe, L.L.C.*, 744 F. Supp. 2d at 888 (“Use of outdated or suspect data as the base of an expert’s testimony are proper grounds to exclude that testimony.”); *Target Mkt. Publ’g, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1145 (7th Cir. 1998) (affirming exclusion of plaintiff’s expert report that relied on defendant’s own projections where such projections were made on assumptions that “had yet, and might never, come to pass” and had been undermined by later developments).

### C. Wagner Performs No Causation Analysis and His Apportionment Is Nonsensical

Even if Wagner had properly calculated Uber’s incremental future profits from accelerated commercialization, his unjust profits analysis would still fail because he did not establish any causal link between those future profits and the specific trade secrets at issue. It is black letter law that Waymo can recover only those “damages for unjust enrichment *caused by* the misappropriation of the trade secret.” 18 U.S. Code § 1836(b)(i)(II) (emphasis added). Wagner failed to do *any* causation analysis, and his attempt to apportion lacks any sound

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<sup>9</sup> *See id.* Ex. 14 at UBER00016463-16464 (Ottomotto Merger Agreement §1.8); *id.* Ex. 15, 9/2/17 van den Berg Dep. at 172:4-172:6 ([REDACTED]).

<sup>10</sup> *Id.* Ex. 16, <https://www.nytimes.com/2017/05/14/technology/lyft-waymo-self-driving-cars.html>; Ex.3, 8/2/17 Krafcik Dep. at 83:11-84:19.

<sup>11</sup> *Id.* Ex. 17, <https://media.ford.com/content/fordmedia/fna/us/en/news/2016/08/16/ford-targets-fully-autonomous-vehicle-for-ride-sharing-in-2021.html>.

<sup>12</sup> *Id.* Ex. 18, <http://media.gm.com/media/us/en/gm/home.detail.html/content/Pages/news/us/en/2017/apr/0413-cruise.html>.

1 methodology.

2       The deficiencies in Wagner’s causation analysis are glaring—he assumes that each trade  
 3 secret would advance not just the development but also the *commercialization* of Uber’s *entire*  
 4 AV program by the exact amount of time that it would take to independently develop the trade  
 5 secret. This serial process assumption is not reliable. It falsely assumes that each trade secret is a  
 6 bottleneck in the AV program, and that Uber’s entire AV program would (i) screech to a halt if  
 7 Uber had to independently develop the trade secret and (ii) jump ahead in all aspects if Uber  
 8 already had the trade secret. For example, according to Wagner, having [REDACTED]  
 9 in Trade Secret 25 would allow Uber to jump ahead in the accelerated development model and  
 10 bypass [REDACTED] of development in entirely separate areas such as software, cameras, other  
 11 LiDAR components, and radar.<sup>13</sup>

12       Even setting aside the speculative nature of future commercialization, Wagner’s  
 13 assumptions ignore the small part LiDAR plays in AV development and the even smaller part  
 14 these specific trade secrets play. According to Waymo, LiDAR is only one of [REDACTED]  
 15 [REDACTED]. (Berry Decl. Ex. 19 at WAYMO-UBER-  
 16 00001363-R.) Uber has only 155 employees in its AV hardware department, compared to 405  
 17 employees in its AV software department. Tellingly, Waymo’s own hardware engineer, Sasha  
 18 Zbrozek, highlighted the low value Waymo places on hardware: “At least historically, high-value  
 19 [information] has been algorithms and software. The hardware (at all levels) was a second class  
 20 citizen.” (*Id.* Ex. 20 at WAYMO-UBER-00086885; *id.* at 86886 (stating that electronics designs,  
 21 including schematics and PCB layouts, were “low-value enough that we had even considered  
 22 hosting it off of Google infrastructure”)). Wagner’s notion that each trade secret related to “low-  
 23 value” LiDAR hardware designs will allow Uber to bypass months or years of software, camera,  
 24 regulatory and customer adoption hurdles has no evidentiary basis.

25       The illogic of Wagner’s methodology is highlighted by the way he aggregates damages  
 26

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27       <sup>13</sup>As Bratic explains, Waymo’s technical expert’s report, upon which Wagner relied, identified  
 28 evidence that Uber allegedly misappropriated at most [REDACTED] present in the  
 document on which Waymo bases Trade Secret 25. Berry Decl. Ex. 2 ¶ 83.

1 for the trade secrets. Apparently to avoid presenting too high of a damage figure, Wagner  
 2 “[REDACTED]” and that “[REDACTED]  
 3 [REDACTED].” So, according to Wagner, Waymo should be awarded [REDACTED] whether  
 4 Uber misappropriated all trade secrets or only Trade Secret 25. This assumption contradicts his  
 5 entire methodology, which assumes that all work has to be performed in a serial process.

7 Finally, the redesign timelines that underpin Wagner’s calculations are unreliable. For  
 8 Trade Secrets 25 and 111, Wagner relies upon the opinions of Waymo’s technical expert,  
 9 Lambertus Hesselink, that it would take [REDACTED], respectively, for Uber to  
 10 independently develop those trade secrets. (Berry Decl. Ex. 1 ¶ 284.) But Trade Secret 25 is  
 11 comprised of [REDACTED] and Waymo has alleged misappropriation of, at most, [REDACTED],  
 12 yet Wagner has not undertaken any apportionment analysis. (*Id.* Ex. 21, Hesselink Rpt. at 38-43.)  
 13 For the remainder of the trade secrets, Wagner uses the independent design timelines from Uber’s  
 14 interrogatory response, but ignores that “[*t*]he Schedule times identified for the redesigns below  
 15 would not significantly or materially impact the timeline for commercialization and rollout of  
 16 Uber’s fully-autonomous self-driving technology to the general public.” (Ex. 2 ¶ 76 (emphasis in  
 17 original); Ex. 22, Uber’s 2d Supp. Resp. to Common Rog. No. 1, at 4.) That means Wagner is  
 18 relying on certain parts of Uber’s interrogatory response while at the same time rejecting other  
 19 parts of the same response.

## 20 **II. WAGNER’S SAVED DEVELOPMENT MODEL IS EQUALLY UNRELIABLE**

21 Like his accelerated development model, the mistakes in Wagner’s saved development  
 22 model are blatant. He takes a [REDACTED] cash burn rate from John Bares’ January 2016  
 23 notes for the *entire* AV program and then assumes that each trade secret saved Uber the entire  
 24 [REDACTED] for the time that it would have taken Uber to independently develop the nine  
 25 discrete trade secrets. (*Id.* Ex. 23 at UBER00060321; Ex. 12 at 214:18-215:1.)

26 This is merely the flip-side of Wagner’s flawed accelerated commercialization model:  
 27 rather than assuming each trade secret allowed Uber to jump ahead by [REDACTED], he assumes that  
 28 independent development of any single trade secret would cause all other work to grind to a halt

1 for [REDACTED] and that Uber's entire burn rate for that period would be wasted. This methodology  
 2 is unreliable for the same reasons as his accelerated commercialization model.

3 It also defies logic that misappropriating one or more of the trade secrets that are limited  
 4 to a specific LiDAR feature could save Uber the expenses of the entire AV program. For  
 5 example, Wagner concludes that Trade Secret 25 would save Uber [REDACTED] in development  
 6 costs because it would have taken Uber [REDACTED] to independently develop that trade secret.  
 7 Putting aside the fact that Waymo's [REDACTED] would have no value for Uber's AV, it  
 8 completely defies logic to say that [REDACTED] could save Uber the cost of running its entire  
 9 AV program, including software, cameras, and radar, [REDACTED]. It further defies logic that  
 10 Uber would continue to employ 716 employees<sup>14</sup> for [REDACTED] when, according to Wagner, no  
 11 one is performing work of value beyond the small team doing the independent development work.

12 Further, Wagner does nothing to test the burn rate on which he relies. The burn rate he  
 13 uses is from John Bares' January 2016 notes, and therefore was 18 months old by the time  
 14 Wagner relied on it. (*Id.* Ex. 23 at UBER00060321.) Yet Wagner failed to analyze what this  
 15 includes (e.g., personnel, cap ex, overhead), what Uber's actual burn rate was, and what it would  
 16 be over time. Wagner's report identifies that he considered this material, but he simply decided  
 17 not to use it without explanation. (*See id.* Ex. 24 at UBER00231732 (August 2017 presentation  
 18 entitled "Financial Management Strategy Advanced Technologies Group" showing that Uber had  
 19 a headcount of 155 people in the Uber hardware department with aggregate monthly salaries of  
 20 [REDACTED].))

21 Finally, as with his accelerated development model, Wagner again contradicts himself by  
 22 assuming that the saved development costs are not additive. That is, Wagner assumes that Uber's  
 23 saved development costs remain exactly the same whether Uber misappropriated only Trade  
 24 Secret 25 or if Uber misappropriated all of the asserted trade secrets. Such an absurd result is the  
 25 hallmark of a flawed model and a failure to apportion. *See O2 Micro Int'l v. Monolithic Power*  
 26

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27 <sup>14</sup> This headcount of 716 does not even include all ATG employees, which exceeds 1,500. (*Id.*  
 28 Ex. 7 at 12:2-25 ("So ATG is a pretty large entity. It's about 1,550 people fully devoted to  
 developing autonomous ride-sharing technology.")).

1 Sys., Inc., 399 F. Supp. 2d 1064, 1077 (N.D. Cal. 2005) (holding that an expert's testimony "does  
 2 not provide a reasonable basis for the jury to apportion damages" and that the unjust enrichment  
 3 damages award based thereon "was based on speculation and guesswork, not on evidence" where  
 4 the expert opined on a value for all trade secrets but did not provide sufficient information for the  
 5 jury to determine how much of the value each individual secret contributed to the total).

6 **III. WAGNER'S UNJUST ENRICHMENT FOR TRADE SECRET NO. 90 IS BASED  
 7 ON A FLAWED METHODOLOGY AND IS CONTRADICTORY**

8 Wagner excluded Trade Secret 90 from his accelerated development and saved  
 9 development expenses models, presumably because the purported [REDACTED]  
 10 independent development time results in a nonsensical [REDACTED] royalty for a concept that Uber  
 11 does not even use. So Wagner instead took the entire [REDACTED] price that Uber paid for Tyto and  
 12 simply assigned that full amount to Trade Secret 90. This methodology is not based on sound  
 13 assumptions and further demonstrates that Wagner's models are result-oriented and contradictory.

14 To begin with, Wagner's opinion that Trade Secret 90 comprised the entire value of Tyto  
 15 is not reliable because the Tyto acquisition included much more. The Tyto acquisition included  
 16 [REDACTED]  
 17 [REDACTED]

18 (See Ex. 1 ¶¶ 301-303.) Wagner discounts the value of the employees by assuming that the  
 19 equity consideration to those employees reflected the full consideration, but he provides no  
 20 analysis to substantiate this assumption. He further fails to analyze the assets of Tyto and  
 21 substantiate his conclusion that they are entirely worthless except for Trade Secret 90.

22 Moreover, Wagner fails to explain how Uber was unjustly enriched by paying [REDACTED]  
 23 for a trade secret that it does not use. Uber already paid [REDACTED] for Tyto and, according to  
 24 Wagner, Trade Secret 90. Wagner fails to explain why Uber must pay another [REDACTED] to  
 25 Waymo for something it does not use.

26 **IV. WAGNER'S REASONABLE ROYALTY OPINION IS UNRELIABLE**

27 Wagner's reasonable royalty opinion is based entirely on his accelerated development  
 28 model, and therefore fails for the same reasons. In addition, Wagner improperly applied the

*Georgia Pacific factors to conclude that the baseline future profits should be increased by*

First, Wagner’s conclusion that the baseline royalty should be increased by [REDACTED] is devoid of any analysis. He walks through each of the *Georgia Pacific* factors, concludes that most are neutral, and then opines without any analysis that the baseline royalty should be increased by [REDACTED] [REDACTED], a number that does not appear anywhere else in his report, or in any evidence he cites. (See Ex. 1 ¶ 439.) That is akin to a “25% rule of thumb” and should be excluded for the same reason. See *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F. 3d 1292, 1318 (Fed. Cir. 2011).

Second, a [REDACTED] enhancement of Wagner’s unjust profits model is illogical. In a hypothetical negotiation, a purchaser would pay only an amount that would permit it to earn a reasonable return on its investment. Wagner fails to show how Uber would profit from paying [REDACTED] of future AV profits to license these discreet trade secrets. It never would, and no rational company would pay more to license the technology than what it would cost to design around, which both Wagner and Bratic assume is possible. Further, the [REDACTED] reasonable royalty for Trade Secret 25 alone is [REDACTED] of the value of Google’s entire AV program in late 2015, according to the Qi Slide upon which Wagner relies. (Berry Decl. Ex. 5 at UBER00069032; *id.* Ex. 10 at 74:7-10 (discussing [REDACTED])).

Third, Wagner fails to apply the *Georgia Pacific* analysis trade secret by trade secret. He also only opined as to lump sum royalties instead of running royalties, which is illogical in a trade secret case like this where Waymo must account for the possibility of an injunction on one or more of the trade secrets,<sup>15</sup> and there are numerous contingencies/risk factors for development, let alone commercialization.

## CONCLUSION

For the above reasons, Uber respectfully requests that the Court exclude the monetary damages opinions and testimony of Michael Wagner as not reliable under *Daubert*.

<sup>15</sup> See, e.g., *Oracle Am., Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA (ECF No. 230 at 11) (N.D. Cal. July 22, 2011) (“[A]ny damages report should address both the assumption that an injunction will be granted and the assumption that an injunction will not be granted.”).

1 Dated: September 16, 2017

SUSMAN GODFREY LLP

2  
3 By: /s/ William Christopher Carmody  
4 William Christopher Carmody

5 Attorneys for Defendants  
6 UBER TECHNOLOGIES, INC.  
7 and OTTOMOTTO LLC

8  
9 **ATTESTATION OF E-FILED SIGNATURE**

10 I, Arturo J. González, am the ECF User whose ID and password are being used to file this  
11 Motion. In compliance with General Order 45, X.B., I hereby attest that William Christopher  
12 Carmody has concurred in this filing.

13 Dated: September 16, 2017

/s/ Arturo J. González

ARTURO J. GONZÁLEZ